Supreme Court, U.S.
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No. 82-490

In the Supreme Court of the United States

October Term, 1981

James E. Davis ..... *Petitioner*

VS.

John W. Goodson ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

By: DENNIS R. MOLOCK
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER AN ATTORNEY WHO, ON GROUNDS OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, ADVISES HIS CLIENT TO REFUSE A COURT ORDER TO TAKE A BREATHALIZER TEST IS IMMUNE FROM CONTEMPT REGARDLESS OF THE MANNER IN WHICH HE CONDUCTS HIMSELF BEFORE THE COURT?

II.

WHETHER THE RULING OF THE RESPONDENT COURT FINDING THE PETITIONER TO BE IN CONTEMPT, AS AFFIRMED BY THE ARKANSAS SUPREME COURT, DENIED THE PETITIONER DUE PROCESS OF LAW?

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 276 Ark. 337, 635 S.W.2d 226 (1982) and is reproduced in the appendix to the Petition for Writ of Certiorari at page 24.

JURISDICTION

The basis for this Court's jurisdiction is adequately set forth at page 5 of the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner has adequately set forth most of the constitutional and statutory provisions involved at pages 6-9 of the Petition. However, respondent submits the following as relevant to the present case:

Ark. Stat. Ann. §34-903 (Repl. 1962)

> Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense.

Rule 42 (a), Federal Rules of Criminal Procedure

> Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT OF THE CASE

The petitioner herein appeared before the Circuit Court of Miller County, Arkansas on November 3, 1981 as counsel for defendant Arlis Brown. As defendant Brown was called to approach the bench it became apparent to the Court that Brown was intoxicated. After questioning Brown with regard to his having consumed alcoholic beverages on that date, the respondent, Honorable John W. Goodson, instructed Brown to go with the sheriff in order to take a "breathalizer" test.

The petitioner inquired as to why Brown should be required to take the ordered test. In response, Judge Goodson explained that he was requiring the test because Brown had appeared in open court, staggering and apparently drunk. Thereafter, the petitioner instructed defendant Brown, in open court, that he did not have to take the test.

Defendant Brown was required to take the ordered test, the results of which indicated that he had in fact been drinking. Subsequently the proceedings were recalled and Brown was found to be in contempt of court. In addition, the court likewise found Brown's counsel, the petitioner herein, to be in contempt for telling Brown in open court that he did not have to obey the court's order. The petitioner was ordered to pay a fine of $250 and to spend 24 hours in jail.

On November 3, 1981 petitioner's counsel appeared before the Arkansas Supreme Court in order to petition for a writ of certiorari. The petitioner was at that time recognized and released from jail.

The merits of petitioner's claim were fully briefed and argued orally before the Arkansas Supreme Court on June 7, 1982. On June 21, 1982 that court issued its opinion affirming the trial court's finding of contempt. *Davis v.*

Goodson, 276 Ark. 337, 635 S.W.2d 226 (1982). Petition for Rehearing was denied on July 19, 1982.

It is from the above-mentioned judgment that the petitioner seeks review by this Court.

REASONS FOR DENYING THE WRIT

It is noted in Rule 17 of the Rules of the Supreme Court that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17 (1) goes on to set out the general considerations governing review of state court decisions as follows:

> . . . (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Initially, respondent notes that the petitioner does not allege that the decision of the Arkansas Supreme Court affirming his contempt citation is in any way inconsistent with the decision of another state court of last resort or a federal court of appeals. Petitioner does rely upon the decision in *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974) in support of the proposition that guilt of contempt of court must be proven beyond a reasonable doubt. However, the Arkansas court noted in its opinion in *Dennison v. Mobley, supra*, that the standard of review in such matters is whether there is any substantial evidence to support the fact finder's verdict. 257 Ark. at pp. 222-223. The standard of review was fully briefed and argued before the Arkansas Supreme Court. Upon considering the record and the briefs submitted by counsel, the Arkansas court concluded . . . "Petitioner was clearly in contempt of court . . . ." 276 Ark. at p. 339.

Petitioner has likewise failed to demonstrate that the instant case falls within the considerations set forth in Rule

17.1 (c)—to wit, involves a federal question which has not been settled by this Court or is in conflict with applicable decisions of this Court. Although petitioner makes an effort to demonstrate that the decision of the Arkansas Supreme Court serves the purpose of modifying this Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), such argument is without merit. The *Miranda* decision addresses the rights of the accused, not those of his counsel.

Although it has not been brought to this Court's attention by the petitioner, respondent has an obligation to discuss the decision of this Court in *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). At first glance it might appear that the *Maness* decision is controlling in the present case inasmuch as it stands for the proposition that an attorney should not be held in contempt for advising his client, in good faith and on Fifth Amendment grounds, to refuse to turn over incriminating materials. However, respondent submits that the *Maness* decision does not mandate either reversal or review of the present case.

Maness v. Meyers, supra, is distinguishable from the present case in two areas: 1) the nature of the order with which the accused refused to comply; and 2) the conduct of counsel.

In *Maness v. Meyer*, counsel advised his client to refrain from abiding by a court-issued subpoena compelling the production of certain written materials (obscene magazines) which would be self-incriminating and would ultimately result in a criminal prosecution. This Court discussed at length the requirement that all orders and judgments of courts must be complied with promptly, even if the order is incorrect, until such time as the order is stayed, appealed, etc. Otherwise, the party risks contempt even if the order is incorrect. 419 U.S. at p. 459. However, this Court went on to discuss the fundamental nature of the Fifth Amendment privilege against self-incrimination and

concluded that counsel could not be held in contempt for advising the client to refuse to turn over incriminating materials. 419 U.S. at pp. 461-466. The nature of the order in the present case—to submit to a "breathalizer" test—is materially different from the order in *Maness v. Meyers, supra.* Minor intrusions into the body, such as to obtain a breath sample, are not violative of the Fifth Amendment privilege against self incrimination. Consider, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

A second distinguishing factor in the present case is the conduct of the attorney. In *Maness v. Meyers, supra*, all parties and the Court were in agreement that there was no evidence of contumacious conduct or any disrespect for the trial court. 419 U.S. at p. 469. Counsel's statements to the court in *Maness, supra*, were made with the respect and professionalism to which the bench is entitled.

In the present case, the exchange took place in open court on a day set aside for arraignment of all persons having felony charges against them. In response to the trial court's order for petitioner's client to go with the sheriff and take a breathalizer test petitioner replied, "Just a minute. I don't see why he should be made to take one." Had the petitioner ceased his remarks at that point, such remarks might have been dismissed as fervent zeal in representing his client. Similarly, had the petitioner offered a formal objection in a manner indicating the appropriate respect for the court, he might have found himself seeking appropriate relief for his client rather than facing a contempt citation. However, subsequent to the respondent court's response to the petitioner's query, the petitioner stated to his client in open court that he did not have to take the test which the court had ordered. The Arkansas Supreme Court acknowledged the petitioner's duty to represent his client zealously, but found that petitioner's conduct offended the dignity of the trial court. 276 Ark. at p. 339. The present case is therefore clearly distinguishable from the facts presented in *Maness v. Meyers, supra.*

With regard to petitioner's due process argument, respondent notes that the issue of sufficiency of evidence was fully briefed and argued before the Arkansas Supreme Court. Upon considering the record of the trial court proceedings in light of such arguments, the Arkansas court concluded that the evidence was in fact sufficient.

Although the right to punish for contempt is inherent in all courts, the Arkansas General Assembly has expressly granted such power to courts of record in the State of Arkansas. Ark. Stat. Ann. §34-901 (Repl. 1962) provides, in part:

> Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others.
>
> > First. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
> > Second. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings.
> > Third. Wilful disobedience of any process or order, lawfully issued or made by it.
> > Fourth. Resistance, wilfully offered, by any person, to the lawful order or process of the court. . . .

Contempts committed in the immediate view and presence of the court may be punished summarily. Ark. Stat. Ann. §34-903 (1962 Repl.). The federal rules are in accord. See Rule 42 (a), Federal Rules of Criminal Procedure.

The primary reason for punishment for criminal contempt is the necessity for maintaining the dignity, integrity and authority of, and respect toward, courts and their decrees. *Dennison v. Mobley, supra*, at p. 221;

Higginbotham v. Williams, Chancellor, 228 Ark. 46, 305 S.W.2d 841 (1957). The deterrent effect on others is just as important as the punishment of an offender. *Dennison v. Mobley, supra*, at p. 221 (other citations omitted).

The actions of the petitioner during the proceedings below were of such a nature as to offend the dignity, integrity and authority of, and respect toward, the respondent court. In flagrant disregard for the respondent court's authority, the petitioner herein interrupted the proceedings and in open court advised his client to defy the court's order. Insolent behavior of this type cannot and must not be tolerated. The dignity and authority of the various courts of this land must be recognized and maintained. The petitioner was properly punished for failure to conduct himself in a manner indicating the proper respect for the respondent court.

CONCLUSION

The petitioner has not demonstrated that the ruling of the trial court or the Arkansas Supreme Court is in conflict with any decision of other state courts, federal courts, or this Court. The petitioner has likewise failed to demonstrate that such ruling involves an important question of federal law which has not been settled by this Court. In view of these reasons and the authorities cited herein, respondent submits that the instant petition should be denied.

Respectfully submitted,

STEVE CLARK
Attorney General

By: DENNIS R. MOLOCK
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Dennis R. Molock, Deputy Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent in Opposition to Petition has been served on petitioner herein by mailing a copy of same, postage prepaid, to C. Wayne Dowd, 1206 State Line Avenue, Texarkana, Arkansas, 75502, Counsel for Petitioner, this 10th day of December, 1982.

DENNIS R. MOLOCK
Deputy Attorney General